

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6129

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONROE COUNTY CONSERVATION COUNCIL, ET AL.,

Plaintiff-Appellants

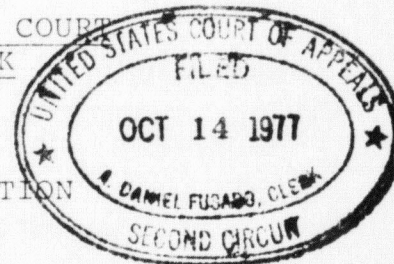
v.

BROCK ADAMS, SECRETARY OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee

ON APPEAL FOR THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF TRANSPORTATION



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OPINION BELOW

The district court, Honorable Harold P. Burke, entered findings of fact and conclusions of law, but did not write an opinion.

JURISDICTION

Final judgment was entered on August 1, 1977. A notice of appeal was filed August 10, 1977. This Court's jurisdiction rests on 28 U.S.C. 1291.

QUESTION PRESENTED

Whether there is a rational basis for the determination by the Federal Highway Administration that, in connection with the closing of the 4.25-mile gap of the Outer Loop Beltway at Rochester, New York, there is no feasible and prudent alternative to the use of a 10.7-acre strip of parkland out of a 763-acre city park.

STATEMENT OF THE CASE

This case involves a 4.25-mile segment of the Outer Loop surrounding the City of Rochester, New York. Most of the Outer Loop was constructed in the 1960's. Construction of the 4.25-mile segment would close the gap in the existing Outer Loop Highway between Scottsville and Winton Roads. Findings and Conclusions, p. 1.

In 1972, pursuant to a decision by this Court, federal funding for the project was enjoined pending compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4332), Section 4(f) of the Department of Transportation Act (DOTA) (49 U.S.C. 1653(f)), Sections 128 and 138 of the Federal-Aid Highway Act (23 U.S.C. 128, 138); and Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693.

On August 1, 1977, pursuant to a petition filed by the Regional Federal Highway Administrator, the district court dissolved the injunction, finding that there had been full compliance

with NEPA, Section 4(f) of DOTA, and Sections 128 and 138 of the Federal-Aid Highway Act. The dissolution was subject to the condition that federal funds would be withheld until the Coast Guard permits, required under the River and Harbor Act, were obtained. These permits have now been obtained (affidavit by Victor E. Taylor, dated September 2, 1977, p. 1, para. 3).

STATEMENT OF FACTS

In 1971, the Monroe County Conservation Council and Ray Huther, a resident of the City of Rochester, New York (hereinafter collectively referred to as Conservation Council), brought this action seeking to prevent federal funding for the construction of a 4.25-mile segment of the 23-mile Outer Loop running around the City of Rochester. The Conservation Council appealed to this Court from a summary judgment dismissing its claim. This Court found that there had been a lack of compliance with NEPA, Section 4(f) of the DOTA, Sections 128 and 138 of the Federal Aid Highway Act, and Section 9 of the River and Harbor Act. This Court directed that federal funding be enjoined pending compliance with these statutes. Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693.

The Conservation Council's objection to the project is that it will go through the Genesee Valley Park (Tr. 1/21/75, p. 57). The Park contains 763 acres. The highway will cut across the northern edge of the park and will occupy 10.7 acres.

The Conservation Council alleges that the highway will damage trees and other flora and fauna, destroy walking paths adjacent to the Erie Barge Canal, interrupt access to the park, produce noise and pollution, and generally inhibit the aesthetic pleasure of the area.

The Park is in a noisy urban area. The Penn Central Railroad tracks skirt the park on the west side and the Erie Lackawanna on the east (Environmental Impact Statement (EIS) Fig. 33). The airport is in very close proximity to the Park (Id.). The park itself is traversed by several busy roads (4(f) Statement, p. 16; Tr. 1/23/75 pp. 14, 54-55).

There is extreme rush hour congestion in the residential area adjoining the proposed loop segment. This rush hour congestion causes accidents, endangering the life and limb of drivers and their passengers (Tr. 1/23/75, pp. 95-96). In addition, rush hour conditions exact a heavy emotional toll from commuters (Tr. 1/23/75, p. 52) and severely impede passage of police, fire and other emergency vehicles (Tr. 1/23/75, pp. 18, 50-52, 72, 101-102). If the loop segment were constructed, this congestion would disappear since through-traffic would take the loop, instead of the streets in the adjoining residential area.

There is extensive unemployment in Rochester. Traffic problems encountered by businesses and factories in shipping goods and materials between the East and West sections of the

Rochester Metropolitan area have hampered efforts to promote regional industrial development (Tr. 1/23/75, pp. 19, 23-26, 59). Completion of the 4.25-mile Loop gap would help solve these difficulties.

On January 21 and 23, 1975, following remand, a public hearing was held at the Monroe County Community College, Rochester, New York, to consider the need for the improvement, the location and design features, as well as the social, economic and environmental effects of the project. Tr. 1/21/75, p. 6. A notice was published prior to the hearing in three different newspapers, in addition to which the State DOT distributed copies of news releases to television and radio stations (EIS Vol. I, p. 345). The hearing was held at a site approximately half-way between the two termini of the Loop segment (Tr. 1/23/75, p. 110). Some 400 people attended the hearing, including representatives of numerous community groups. Among those testifying were witnesses called by appellants, as well as some state officials.

After the public hearing was held, a final environmental impact statement (EIS) on the project was prepared. The EIS includes a "4(f) statement" documenting compliance with 49 U.S.C. sec. 1653(f).

In July 1977, the Regional Federal Highway Administration filed a petition with the district court asking that the injunction be dissolved because there had been full compliance

with the terms of the injunction. ^{1/} Attached to the petition were three affidavits, the transcript of the public hearings, the EIS, including the 4(f) Statement for the project and the EIS for the Genesee Expressway. ^{2/} The district court issued an order to show cause why the injunction should not be dissolved. The Conservation Council filed an answer and an affidavit in opposition to the motion. In the affidavit, the Conservation Council alleged, inter alia, that the Secretary of Transportation had failed to give genuine consideration to feasible alternate routes; had failed to determine the social effect of the proposed road on area residents; and had failed to undertake a study to identify the people utilizing the park and the manner in which it was used.

On August 1, 1977, the district court entered findings of fact and conclusions of law. The district court found that the Secretary had complied with NEPA and 23 U.S.C. sections 128 and 138. In addition, the district court found that the 4(f) Statement showed that there was no feasible or prudent alternative to the use of the Genesee Valley Park

^{1/} At the time of the petition, compliance with the River and Harbor Act which requires the State to obtain a Coast Guard permit prior to the construction of a bridge across a navigable river was incomplete. Insofar as Coast Guard permits are involved, the Regional Administrator assured the court that federal funding would be contingent on the issuance by the Coast Guard of all needed bridge permits. These permits have now been obtained (affidavit by Victor E. Taylor dated September 2, 1977, p. 1, para. 3).

^{2/} The Expressway is designed to connect the Loop with the New York Thruway.

and that all possible planning had been done to minimize the harm to the park (Finding of Fact 2(a)).

The district court further found that to proceed with alternatives outside the park, or to fail to build, would present unique problems and factors of cost and would cause community disruption of extraordinary magnitude. Findings and Conclusions p. 7. The district court also found that the State Department of Transportation was then in the process of obtaining the necessary bridge permits from the Coast Guard and that Coast Guard approval was anticipated by September 30, 1977. Finally, the court found that, under the circumstances, the representation by the State of New York that the closing of the Outer Loop gap was vital to its economy and to the strengthening of its transportation system, constituted a sufficient cause to vacate the injunction. On August 1, 1977, the district court vacated the injunction "upon the condition that the project shall not be federally funded until such time as the requisite Coast Guard permits are granted." This appeal followed. The Conservation Council filed a motion for a stay pending appeal with this Court, but did not file such a motion with the district court. The Secretary of Transportation filed an opposition to this motion with a supporting affidavit. The parties agreed that the motion might be heard by this Court at the same time as the appeal on the merits.

ARGUMENT

I

THERE IS A RATIONAL BASIS FOR THE DETERMINATION
THAT THERE IS NO FEASIBLE AND PRUDENT
ALTERNATIVE TO THE TAKING OF PARKLAND

In reviewing the Administrator's determination under 4(f), a court must decide whether the Administrator acted within the scope of his authority; whether the Administrator's action followed the procedural requirements; and whether his decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The reviewing court must determine whether the Administrator could have reasonably believed that in this case there are no feasible and prudent alternatives. Although the inquiry is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. Citizen to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-417 (1971).

The plaintiffs, challenging the Administrator's compliance, have the burden of showing by a preponderance of the evidence that the 4(f) determination was in error. Sierra Club v. Callaway, 499 F.2d 982, 992 (C.A. 5, 1974); Finish Allatoona's Interstate Right, Inc. v. Brinegar, 484 F.2d 638, 639 (C.A. 5, 1973). Having failed to persuade the trial court of their contentions, plaintiffs now bear the additional burden of demonstrating that the district court's findings were clearly erroneous. Sierra Club v. Morton, 510 F.2d 813, 818 (C.A. 5, 1975); Cummington Preservation Committee v. FAA, 524 F.2d 241, 243 (C.A. 1, 1975).

In this case, the Administrator acted within the scope of his authority and followed all required procedures. Section 4(f) prohibits the use of parkland in the construction of a highway unless a study is first made to determine whether there is a feasible and prudent alternative. Thereafter, if such a finding that parkland is needed has been made, every possible effort must be made to minimize harm to the park. See Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398, 402 (C.A. 4, 1977). As the Supreme Court has stated, "* * * protection of parkland was to be given paramount importance." Overton Park, supra, 401 U.S. at 412-413.

The 4(f) Statement in this case is an in-depth study of the project and its alternatives. The Statement describes the park; the use made by the public of the different parts thereof, 4(f) Statement, pp. 15-32; the effect of the project on the park, 4(f) Statement, pp. 30-32; the planning undertaken to minimize the adverse impact of the road on the park, 4(f) Statement, pp. 34-45; the alternatives to the taking of parkland, 4(f) Statement, pp. 57-60; and the location and design alternatives of a route through the park (e.g. tunnels), 4(f) Statement, pp. 61-68.

On the basis of the EIS and the 4(f) Statement, the Federal Highway Administrator concluded that there is no feasible prudent alternative to the taking of parkland and that the chosen location minimizes the harm to the park.

Exhibit 5 attached to the Victor E. Taylor affidavit dated July 21, 1977, hereinafter referred to as attachment 5. The Administrator's conclusions have a rational basis. This Court stated the applicable criteria in the first Monroe County case: "a prudent alternative route is one that does not present unique problems, that is, an alternative without truly unusual factors so that the cost or community disruption would reach extraordinary magnitudes. . . ." 472 F.2d at 700.

In this case, the Administrator rejected the alternatives to the North of the park as not being prudent, because they would cause extensive displacement of residential areas as well as the Main Campus of the University of Rochester and the Mt. Hope Cemetery. 4(f) Statement, p. 57. Contrary to appellants' suggestion (Br. 16), the Administrator also considered three alternative routes to the South of the Park (EIS Vol. I, pp. 252-253; EIS Vol. II, Appendix G, pp. 1-25). Two of the Southern routes considered would require the displacement of at least 51 families; would substantially increase noise levels in the residential area through which they would run; would add to "urban sprawl"; would double the distance travelled; would provide insufficient traffic relief on certain local arteries; and would be considerably more costly (EIS Vol. II, Appendix G, pp. 18-22; 4(f) Statement, p. 59). The third Southern alternative would have only

partially closed the Loop Gap (Attachment 5, p. 2). For these and other reasons, the Administrator rejected the Southern alternative routes as not being prudent. Attachment 5, p. 2. The arterial improvements solution (EIS Vol. I, p. 271) was rejected because it would not be extensive enough to fully cope with the expected growth in traffic. Moreover, this alternative would displace people and businesses and cause a loss of amenities (such as front yards and trees).

The Administrator also rejected a mass transit solution since a sufficiently significant diversion of automobile traffic to mass transit cannot be anticipated (Attach 5, p. 3; EIS Vol. I, pp. 224-238, 271). In light of current traffic safety problems, a "do-nothing" alternative would not be viable. EIS Vol. I, pp. 218-224, 270. Even the Conservation Council, while objecting to the park route selected, concedes that the road should be completed (Tr. 1/21/75, p. 57).

In order to minimize the harm to the park, the Administrator also considered location and design alternatives for the route going through the park. Attachment 5, pp. 3-5; 4(f) Statement, pp. 44-46, 61-71; EIS Vol. I, pp. II-III, 47-53, 192-203, 248, 255-266, 273-275.

Twelve different design concepts were considered, 4(f) Statement, p.38. The design chosen for the Outer Loop segment extending between the Penn Central Railroad tracks on the west and Red Creek on the east calls for an elevated concrete structure spanning the railroad tracks and Red Creek as well as the park area lying between them, 4(f) Statement, p.33. The selection of a concrete box superstructure for the viaduct as the basic design concept was predicated in part on aesthetic considerations. In order to preserve a sense of openness to the extent possible, the design uses a minimum number of piers and a high vertical clearance between the ground and the superstructure, 4(f) Statement, p.33. By being as open as feasible, blind spots and nooks and crannies (which might jeopardize safety) have been minimized, 4 (f) Statement, p.38. In constructing the viaduct section through the park, every effort will be made to save existing trees and new ones will be planted, 4 (f) Statement, pp.39-40,43.

Particular attention was given to tunneling alternatives. EIS vol. II, Appendix C, pp. 1-35; EIS vol. I, pp. 255-258; 4 (f) Statement, pp. 61-65. / Highway tunnels may be constructed from the surface

/ It should be noted that DOT Order 5610.1B only requires detailed cost estimates of alternatives "as appropriate," 39 Fed. Reg. 35245 (September 30, 1974).

(e.g. cut-and-cover tunnels) or by mining methods (i.e. without removing the overlying rock or soil). In this case, cost estimates were prepared for two methods of tunneling for each of 2 separate routes. EIS vol. II, Appendix C. The cost studies were based on ideal subsoil and rock conditions. If actual conditions are anything less than ideal, the real cost of the tunneling alternatives would be much higher (EIS vol. II, Appendix C p. 3; Attach. 5, pp. 3-4; 4 (f) Statement pp. 61-65). Of course, a tunnel would have to meet federal standards. Tunneling would have increased the project cost by at least \$40,000,000.00, thereby doubling construction costs. While the Conservation Council's witness attacked DOT's figures, the witness conceded that a tunnel would increase the project's cost by 50%, J.A. 43. One of the tunneling alternatives studied would have required the removal of 600 trees in the park during construction, 4 (f) Statement p. 64. Two of the other tunneling alternatives would have required use of 8 acres of parkland, 4 (f) Statement, pp. 64-65. All of the tunneling alternatives would present serious visibility, signing and merging conflicts at the west portal where they would approach the Scottsville Road Interchange. (Attachment 5, pp. 3-4; EIS vol. II, Appendix C pp. 79-80; Tr. 1/21/75 pp. 43, 49, 54.)

The Administrator rejected the tunneling alternatives.

Other alignment alternatives were considered, and rejected, because they either had a greater adverse effect on the park (4 (f) Statement, p. 44,67); or, by requiring the displacement of 27 or 34 homes, would have a general deleterious impact on adjoining residential neighborhoods, (4 (f) Statement, pp. 67, 70-71). One alternative studied entailed a shift in road alignment 150 feet to the south (4 (f) Statement, p. 44). While this alternative would have destroyed 25 per cent fewer trees, it would have reduced the length of two golf course holes and would have required the removal of the trees which (under the recommended alignment) would screen the Outer Loop from the golf course and playfields, 4 (f) Statement, p.44. A further alternative (Alternative "B", EIS, vol. I, Figure 14 and pp.II, 49; 4 (f) Statement p. 70) would have run through the park in a north-south direction. This alternative was rejected because it would have required 17.4 acres of parkland and the acquisition of 34 homes. Another alternative considered (Alternative "C", EIS, vol. I, Figure 15, and pp.II, 49; 4 (f) Statement, pp. 66-70) would have used very little parkland. This alternative, however, would have required the widening of some existing residential streets. It would, moreover, have been an at-grade signalized artery only, providing limited traffic relief (Attachment 5, p.5). Finally, it would have involved the acquisition of at least 27 homes,

and since installation of noise barriers would have to be limited, the adjoining residential area would have been severely impacted. For these reasons, this alternative was also rejected as imprudent (Attachment 5, p.5).

As discussed infra, many other steps were also taken to minimize the harm to the park. Under the circumstances, it is clear that there has been full compliance with section 4 (f) of the DOTA and 23 U.S.C. Sec. 133. Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (C.A. 2, 1972).

II

THE PROJECT HAS BEEN MODIFIED TO AVOID ADVERSE SOCIAL IMPACTS

The Conservation Council contends (Br. 11-12) that the EIS is insufficient because it fails to comply with DOT order 5610.1B (39 Fed. Reg. 35234, 35245 (September 30, 1974)) which requires the Administrator to consider the social impact of the project. In this case, the Administrator noted the potentially undesirable social effects of the project and took steps to prevent them (EIS Vol. I, p.294). The modification of the project to avoid adverse social impacts dispensed with the need to discuss adverse social effects. On the other hand, the beneficial effects were fully identified. No people or businesses will be displaced by the project (EIS Vol. I, p. II; Tr. 1/23/75, p.19).

While the project will utilize 10.7 acres out of an 763-acre park, the strip which will be occupied does not represent a heavy use area of the park (Tr. 1/23/75, p. 55). Elaborate noise barriers will be installed, 4 (f) Statement, p. 40; and provision has been made for additional pedestrian access to the remainder of the park (EIS Vol. I, pp. 294, 32, 191; 4 (f) Statement, pp. 32, 43, 56). In addition, plans have been made for the development of a new 12.13-mile long bike-hiking trail (Taylor affidavit dated 7/21/77, p. 6; Tr. 1/23/75, p. 55). The new bike trail would make available for recreational use 36.9 additional acres and would provide access to 11 miles of the Erie Barge Canal which were previously inaccessible, 4 (f) Statement, pp. 46-47; Affidavit by Victor E. Taylor, dated 7/21/77, p. 6. Finally, a busy road now running through the park will be closed to through-traffic, 4 (f) Statement, pp. 23, 43; EIS, Vol. I, p. III; Tr. 1/23/75, pp. 54-55. Under the circumstances, DOT clearly complied with the requirements of DOT Order No. 5610.1B (39 Fed. Reg. 35234, 35245) concerning evaluation of actual social impacts.

The federal officials have fully complied with the directions embodied in this Court's mandate. Accordingly, the district court did not abuse its discretion when it vacated its injunction against federal funding of the 4.25-mile segment of the Outer Loop.

CONCLUSION

For the foregoing reasons, the judgment below
should be affirmed.

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OCTOBER 1977

90-1-4-341